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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ANTHONY NARBONA,
12 CDCR #H-28385,

13 Plaintiff,

14
15 vs.
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17 HONIG, Deputy;
18 JOHN DOES 1 - 20, County Deputies;
19 JOHN DOES 1 - 20, Floor Officers;
20 JOHN DOES 1 - 20, Breakfast Deputy,
21 Defendants.

Civil No. 08-0663 JM (LSP)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO PARTIAL FILING
FEE, GARNISHING \$350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2];**

AND

**(2) DISMISSING COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b)**

22 Anthony Narbona ("Plaintiff"), a state prisoner currently incarcerated at the Sierra
23 Conservation Center located in Jamestown, California, and proceeding pro se, has filed a civil
24 rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that, while he was detained at
25 the San Diego Central Jail and the South Bay Detention Facility, San Diego Sheriff Deputies
26 were deliberately indifferent to his serious medical needs in violation of his constitutional rights.

27 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead,

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1 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)
2 [Doc. No. 2].

3 **I. MOTION TO PROCEED IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the United
5 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
6 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
7 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
8 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to
9 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their
10 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d
11 844, 847 (9th Cir. 2002).

12 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
13 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
14 statement (or institutional equivalent) for the prisoner for the six-month period immediately
15 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
16 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
17 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
18 (b) the average monthly balance in the account for the past six months, whichever is greater,
19 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
20 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
21 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
22 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
23 § 1915(b)(2).

24 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
25 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
26 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. Plaintiff’s trust
27 account statement shows that he has no available funds from which to pay filing fees at this time.
28 *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from

1 bringing a civil action or appealing a civil action or criminal judgment for the reason that the
2 prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281
3 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal
4 of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available to
5 him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed
6 IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,
7 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
8 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

9 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

10 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also
11 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
12 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
13 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
14 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
15 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
16 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,
17 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
18 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
19 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
20 2000) (§ 1915A).

21 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
22 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
23 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit
24 make and rule on its own motion to dismiss before directing that the Complaint be served by the
25 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,
26 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
27 claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
28 § 1915A).

1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
2 allegations of material fact and must construe those facts in the light most favorable to the
3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even
5 presuming Plaintiff’s allegations true, the Court finds his Complaint fails to state a claim upon
6 which relief can be granted. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at
7 1126-27; *Resnick*, 213 F.3d at 446, n.1.

8 Where a prisoner’s Eighth Amendment claim is one of inadequate medical care, the
9 prisoner must allege “acts or omissions sufficiently harmful to evidence deliberate indifference
10 to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a claim has two
11 elements: “the seriousness of the prisoner’s medical need and the nature of the defendant’s
12 response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on*
13 *other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). A medical
14 need is serious “if the failure to treat the prisoner’s condition could result in further significant
15 injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974 F.2d at 1059 (quoting
16 *Estelle*, 429 U.S. at 104). Indications of a serious medical need include “the presence of a
17 medical condition that significantly affects an individual’s daily activities.” *Id.* at 1059-60. By
18 establishing the existence of a serious medical need, a prisoner satisfies the objective
19 requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*, 511 U.S. 825, 834
20 (1994).

21 Here, the Court finds that Plaintiff’s allegations regarding a blood clot in his lung and
22 congenital heart failure sufficient show that his medical needs were serious enough to satisfy
23 the objective component of an Eighth Amendment violation. See *McGuckin*, 974 F.3d at 1059-
24 60; *Farmer*, 511 U.S. at 834.

25 However, while Plaintiff has alleged facts sufficient to establish the existence of a serious
26 medical need, he must also allege that each Defendant’s response to his need was deliberately
27 indifferent. *Farmer*, 511 U.S. at 834. In general, deliberate indifference may be shown when
28 prison officials deny, delay, or intentionally interfere with a prescribed course of medical

1 treatment, or it may be shown by the way in which prison medical officials provide necessary
2 care. *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said
3 that a prisoner's civil rights have been abridged with regard to medical care, however, "the
4 indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or
5 'medical malpractice' will not support this cause of action." *Broughton v. Cutter Laboratories*,
6 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06). *See also Toguchi v.*
7 *Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

8 Here, Plaintiff claims that while he was held in the San Diego Central Jail overnight,
9 unnamed Sheriff Deputies ignored his claims that he was short of breath. The next day he was
10 taken to the "3rd floor medical" and an ambulance was called. *See* Compl. at 6. While Plaintiff
11 clearly has a serious medical condition, there are no allegations that the overnight delay in
12 seeking treatment caused him any additional injury. *See Shapley v. Nevada Bd. of State Prison*
13 *Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (a prisoner can make "no claim for deliberate
14 medical indifference unless the denial was harmful.") Moreover, Plaintiff is apparently unable
15 to identify any of the Deputies whom he claims were deliberately indifferent to his serious
16 medical need.

17 Thus, the Court finds that he has failed to state an Eighth Amendment claim upon which
18 relief can be granted, and his Complaint must be dismissed pursuant to 28 U.S.C.
19 §§ 1915(e)(2)(b) & 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.
20 However, because Plaintiff could possibly cure the defects of pleading identified in this Order,
21 he is hereby granted an opportunity to amend. *Lopez*, 203 F.3d at 1127 (leave to amend is
22 generally appropriate unless the court has determined, "that the pleading could not possibly be
23 cured by the allegation of other facts."). Plaintiff is cautioned, however, that he must make a
24 greater attempt to identify the officers whom he claims violated his constitutional rights.

25 **III. CONCLUSION AND ORDER**

26 Good cause appearing, **IT IS HEREBY ORDERED** that:

27 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
28 **GRANTED.**

2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month's income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.


IT IS FURTHER ORDERED that:

4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5. The Clerk of the Court is directed to mail a Court approved form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: July 1, 2008


Hon. Jeffrey T. Miller
United States District Judge